IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 15, 2008

GREGORY HARRIS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Sullivan County
Nos. S46640 R. Jerry Beck, Judge

No. E2007-02889-CCA-R3-PC - Filed March 4, 2009

Petitioner, Greg Harris, was convicted in Sullivan County of criminal conspiracy to sell or deliver more than 300 grams of cocaine, possession of more than 300 grams of cocaine for resale within 1000 feet of a school, and two counts of possession of drug paraphernalia. As a result, he was sentenced to an effective sentence of fifty years. On appeal, this Court modified Petitioner's sentences to twenty-four years on each felony charge and reversed the trial court's imposition of consecutive sentences, resulting in Petitioner's effective sentence being reduced from fifty years to twenty-four years. *State v. Greg Harris*, No. E2003-02834-CCA-R3-CD, 2005 WL 419082, at *1 (Tenn. Crim. App., at Knoxville, Feb. 23, 2005). Petitioner subsequently sought post-conviction relief in a petition that was dismissed by the post-conviction court. The dismissal of that petition was affirmed on appeal. *Greg Harris v. State*, No. E2006-00406-CCA-R3-PC, 2006 WL 3613608 (Tenn. Crim. App., at Knoxville, Dec. 12, 2006). In October of 2007, Petitioner sought relief via the writ of error coram nobis, alleging that newly-discovered evidence warranted a reversal of his convictions. The trial court dismissed the petition as untimely. Petitioner seeks a review of the trial court's dismissal. We determine that the petition for writ of error coram nobis was untimely and, therefore, affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Gregory Harris, Pro Se, Mountain City, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Greeley Wells, District Attorney General, and Joseph E. Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Petitioner's arrest and subsequent conviction resulted from the discovery of 589.6 grams of cocaine and various items of drug paraphernalia that were seized from the apartment of Charles Miller. *Greg Harris*, 2005 WL 419082, at *1. The police went to the apartment to arrest Petitioner and Mr. Miller and, in the process, discovered items related to the manufacture and sale of cocaine. The police obtained a search warrant based on their observations and on information obtained from an informant. *Id.* After a jury trial, Petitioner was convicted of criminal conspiracy to sell or deliver more than 300 grams of cocaine, possession of more than 300 grams of cocaine for resale within 1000 feet of a school, and two counts of possession of drug paraphernalia. *Id.* The trial court sentenced Petitioner to twenty-five years for the conspiracy conviction and twenty-five years for the possession of cocaine for resale conviction. The trial court ordered those sentences to run consecutively to each other but concurrently to the eleven month and twenty-nine day sentences that Petitioner received for the two convictions for possession of drug paraphernalia, for a total effective sentence of fifty years. *Id.* On appeal, this Court determined that the trial court improperly ordered consecutive sentencing. Further, this Court modified Petitioner's sentences from twenty-five years to twenty-four years on the convictions for conspiracy and possession of cocaine. *Id.* at *18. On remand, the trial court resentenced Petitioner on October 24, 2005, to twenty-four years in incarceration.

Petitioner subsequently sought post-conviction relief. *See Greg Harris*, 2006 WL 3613608, at *1. The trial court held that the petition did not present a colorable claim and/or that the issues had been previously determined, refused to appoint counsel, and dismissed the petition. The dismissal was affirmed on appeal. *Id.* at *4.

On October 24, 2007, Petitioner filed a petition for writ of error coram nobis in which he alleged that newly-discovered evidence entitled him to relief. Specifically, Petitioner alleged that on July 24, 2007, he discovered that the search warrant was obtained based upon false and fraudulent information that the police received from the confidential informant. At the time of the petition, Petitioner alleged that he had discovered that the confidential informant was James Ashley. Petitioner alleged that Mr. Ashley never made the statements relied upon by police to obtain the search warrant. Petitioner claimed that he was without fault in failing to present the newly-discovered evidence at trial because Mr. Ashley was a fugitive at the time of trial and unavailable until November 15, 2005.

In support of his petition, Petitioner attached sworn affidavits from Martin C. Jones and a letter from Mr. Ashley. Mr. Jones swore in the affidavit that he was temporarily housed with Mr. Ashley at Brushy Mountain Correctional Facility. During their time together, Mr. Ashley discovered that Mr. Jones was acquainted with Petitioner. Mr. Ashley read this Court's opinion on appeal and "exclaim[ed] responses to the effect that, Agent Nelson, of the T.B.I., lied about what was actually said by Ashley to Nelson . . . to support the issuance of the search warrant . . . ."

Appellant also included a letter from Mr. Ashley dated November 15, 2005. The vast majority of the letter is illegible, but Mr. Ashley asserts in one section that "Agent Nelson lied about what I said to obtain the warrant" and offers to "help" Petitioner.

Mr. Ashley provided a sworn statement on July 24, 2007. In that statement he does not indicate that he was actually the informant. Mr. Ashley merely states that he spoke with Petitioner's codefendant about a drug transaction. The sworn statement makes no reference to the letter allegedly drafted by Mr. Ashley on November 11, 2005.

The State replied to the petition by asserting that it was not timely filed and should be dismissed. On November 7, 2007, the trial court issued an order in which it determined that Petitioner was "long barred by the statute of limitations." Further, the trial court determined that Petitioner waited nearly two years after discovering the new evidence to file the petition for relief and that the affidavits are "not sufficient to command a hearing or further consideration." As a result, the trial court dismissed the petition without a hearing.

Petitioner filed a timely notice of appeal for a review of the trial court's decision.

Analysis

Tennessee Code Annotated section 40-26-105 provides:

> (a) There is made available to convicted defendants in criminal cases a proceeding in the nature of a writ of error coram nobis, to be governed by the same rules and procedure applicable to the writ of error coram nobis in civil cases, except insofar as inconsistent herewith. Notice of the suing out of the writ shall be served on the district attorney general. No judge shall have authority to order the writ to operate as a supersedeas. The court shall have authority to order the person having custody of the petitioner to produce the petitioner in court for the hearing of the proceeding.
>
> (b) The relief obtainable by this proceeding shall be confined to errors dehors the record and to matters that were not or could not have been litigated on the trial of the case, on a motion for a new trial, on appeal in the nature of a writ of error, on writ of error, or in a habeas corpus proceeding. Upon a showing by the defendant that the defendant was without fault in failing to present certain evidence at the proper time, a writ of error coram nobis will lie for subsequently or newly discovered evidence relating to matters which were litigated at the trial if the judge determines that such evidence may have resulted in a different judgment, had it been presented at the trial.
>
> (c)The issue shall be tried by the court without the intervention of a jury, and if the decision be in favor of the petitioner, the judgment complained of shall be set aside and the defendant shall be granted a new trial in that cause. In the event a new trial is granted, the court

> may, in its discretion, admit the petitioner to bail; provided, that the offense is bailable. If not admitted to bail, the petitioner shall be confined in the county jail to await trial.
>
> (d) The petitioner or the state may pray an appeal in the nature of a writ of error to the supreme court from the final judgment in this proceeding.

Tennessee Code Annotated section 27-7-103 provides that the statute of limitations for coram nobis petitions is one year from the date the judgment from which relief is sought becomes final.

In the instant case Appellant was re-sentenced on October 24, 2005, following his direct appeal to this Court. He apparently learned in mid-November, 2005, about the allegedly newly discovered evidence yet did not file for coram nobis relief until October 24, 2007, nearly two years after the judgment against him had become final. Appellant has offered no reason for tolling of the one year filing limitation and thus the trial court properly dismissed the petition as time-barred. *See State v. Mixon*, 983 S.W.2d 661, 668 (Tenn. 1999).

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE